Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES HARRISON,

Petitioner

v.

DONALD T. VAUGHN, et al.

Respondents

On Petition for a Writ of Certiorari
To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

George Henry Newman
Counsel of Record
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834 Chestnut Street, Suite 206
Philadelphia, PA 19107
215-592-9400

QUESTIONS PRESENTED

I. Was petitioner, Charles Harrison denied Due Process under the Fifth and Fourteenth Amendments when the trial judge failed to instruct the jury that it must acquit if petitioner's alibi evidence, even if not wholly believed, raised a reasonable doubt of his presence at the scene of the crime at the time of its commission and, thus, of his guilt?

II. Was not petitioner, Charles Harrison deprived of his right to effective assistance of counsel guaranteed by the Sixth Amendment where prior counsel failed to raise the above Due Process violation?

LIST OF ALL PARTIES

Charles Harrison, Petitioner

Donald T. Vaughn, Superintendent, State Correctional Institution at Graterford

D. Michael Fisher, State Attorney General

The District Attorney for Philadelphia County, Respondents

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1. Petitioner, Charles Harrison was denied Due Process under the Fifth and Fourteenth Amendments when the trial judge failed to instruct the jury that it must acquit if petitioner's alibi

evidence, even if not wholly believed, raised a reasonable doubt of his presence at the scene of the crime at the time of its commission and, thus, of his guilt.

2. Petitioner, Charles Harrison was deprived of his right to effective assistance of counsel guaranteed by the Sixth Amendment where prior counsel failed to raise the above Due Process violation.

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The Order of the United States District Court for the Eastern District of Pennsylvania, denying petitioner's Petition for Writ of Habeas Corpus under 28 U.S.C. §2254 without an evidentiary hearing, dated August 1, 2001, is Appendix "C".

The Report and Recommendation of the United States District Court for the Eastern District of Pennsylvania, denying and dismissing petitioner's petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254, dated June 25, 2001, is Appendix "D".

JURISDICTION

The United States Court of Appeals for the Third Circuit denied Mr. Harrison's petition for *en banc* rehearing from the denial of his application for a certificate of appealability on January 9, 2003. By Order dated April 3, 2003, Justice Souter extended the time for filing to and including June 8, 2003. This petition is filed within that time. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a).

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the United States Constitution provides, in pertinent part, that "No person shall. . .be deprived of. . . liberty. . .without due process of law. . ."

Amendment VI to the United States Constitution provides, in pertinent part, that "In all criminal prosecutions, the accused shall. . .have the assistance of counsel for his defense."

Amendment XIV to the United States Constitution provides, in pertinent part, that "No state shall. . .deprive any person of. . .liberty. . .without due process of law. . ."

STATEMENT OF THE CASE

This appeal arises from the denial, by the United States Court of Appeals for the Third Circuit, of petitioners' request for *en banc* rehearing of its denial of a request for a certificate of appealability from the District Court's denial of petitioner's Habeas Corpus Petition pursuant to 28 U.S.C.A. §2254.

A. Procedural History

Petitioner, Charles Harrison, was convicted on June 2, 1988, of first degree murder and related charges in the July 3, 1986 fatal shooting of one Augustus Favors. Mr. Harrison was sentenced to a mandatory sentence of life imprisonment.

Petitioner appealed to the Pennsylvania Superior Court, raising various ineffective assistance of counsel and sufficiency of evidence claims. The Superior Court affirmed the judgments of sentence on January 16, 1990. On July 18, 1990, the Pennsylvania Supreme Court declined to hear petitioners' petition for allowance of appeal.

On January 17, 1996, petitioner filed a timely petition under Pennsylvania's Post Conviction Relief Act (PCRA). As required by Pennsylvania law, counsel was appointed to represent petitioner and to file a counseled, amended petition. However, appointed counsel wrote a letter to the PCRA court claiming, pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), that there were no issues of arguable merit upon which to base an amended petition. Petitioner promptly filed *pro se* objections to the *Finley* letter in which, *inter alia*, he specifically raised the failure of the trial judge to give an alibi jury charge, and ineffective assistance of prior counsel in failing to raise this issue. The PCRA court dismissed the PCRA petition, and permitted counsel to withdraw.

Petitioner, filed a *pro se* appeal to the Pennsylvania Superior Court, in which he raised *inter alia*, the alibi jury charge issue. The Pennsylvania Superior Court found all issues waived, and denied relief. The Pennsylvania Supreme Court again refused to hear Mr. Harrison's appeal.

On April 9, 1999, petitioner filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States

District Court for the Eastern District of Pennsylvania. On March 28, 2000, Mr. Harrison filed a counseled Habeas Corpus Petition, pursuant to 28 U.S.C. §2254, raising, *inter alia*, the denial of a fair trial and due process of law when the trial judge failed to give an alibi instruction in the jury charge.

On August 1, 2001, the District Court dismissed petitioners' Writ of Habeas Corpus, holding that the alibi charge and ineffective assistance issue, and all others, were procedurally defaulted.

Petitioner filed a timely *pro se* motion for a certificate of appealability in the United States Court of Appeals for the Third Circuit. That motion was denied on November 13, 2002. Petitioner filed a *pro se* petition for rehearing *en banc* on November 27, 2002, which was denied on January 9, 2003.

B. Statement of Facts

In the early morning hours of July 3, 1986, Augustus Favors was fatally shot at 29th Street and Columbia Avenue in Philadelphia, Pennsylvania. Mr. Harrison was arrested and

charged with the homicide. At his 1986 trial, Mr. Harrison and his wife testified that he was at home, or at a different street corner, when the shooting occurred. The trial court instructed the jury that it was to consider whether Mr. Harrison's evidence that he was somewhere else raised a reasonable doubt in their minds. The court did not specifically instruct the jury that the Commonwealth had the burden of disproving the alibi beyond an reasonable doubt. Mr. Harrison was convicted of first degree murder and related charges.

Trial counsel filed post-verdict motions, as he was required to do under then Pennsylvania law, but did not raise issue of the trial court's failure to give the above, omitted instruction. Trial counsel also moved to withdraw, which request was promptly granted.

New counsel was appointed on appeal, but that counsel was, under Pennsylvania law, constrained to raise only those issues which were raised on post-verdict motions. Thus, appeal counsel did not raise the omitted complete alibi jury charge issue on direct appeal. Petitioner Harrison then filed a *pro se* petition for

allowance of appeal to the Pennsylvania Supreme Court, which was denied. Harrison, all un-counseled, then filed a PCRA petition in the Philadelphia Court of Common Pleas. Pennsylvania law required the appointment of counsel for a first PCRA Petition. Counsel was appointed, but that lawyer did nothing more than argue, in a *Finley* letter, why none of the issues Mr. Harrison raised *pro se* were meritorious. Newly appointed counsel simultaneously asked to withdraw, which request was promptly granted. Petitioner Harrison filed objections to his own lawyer's *Finley* letter, arguing *inter alia*, that the trial judge failed to give a specific alibi defense charge, as required, and that all prior counsel were ineffective for failing to raise this issue. Nevertheless, the PCRA court denied petitioners' PCRA petition without a hearing. Petitioner Harrison filed a *pro se* appeal to the Pennsylvania Superior Court, raising the alibi charge issue (appellant's brief for (SIC) Superior Court, issue 4.) The Pennsylvania Superior Court held the issue waived by Mr. Harrison's direct appeal counsel, whose ineffectiveness in that regard Mr. Harrison had raised in his objections to the *Finley* letter at the trial court level. Mr. Harrison's petition for

allowance of appeal to the Pennsylvania Supreme Court was denied, per curium.

Mr. Harrison next filed an un-counseled federal habeas corpus petition under 18 U.S.C. §2254 in the United States District Court for the Eastern District of Pennsylvania. The District Court initially dismissed Mr. Harrison's petition for failure to pay the five dollar filing fee. Mr. Harrison's family then retained counsel for Mr. Harrison, and counsel proved to the court that a five dollar check had been issued by the prison in which Mr. Harrison is incarcerated, but had been inexplicably returned to the prison, even though there were sufficient funds to cover the five dollar check. The District Court then dismissed Mr. Harrison's Habeas Corpus Petition, finding that he had failed to allege cause and prejudice in relation to his ineffective assistance of counsel claims.

Mr. Harrison filed a motion for a certificate of appealability to the United States Court of Appeals for the Third Circuit. In that motion, Mr. Harrison pointed out that he had argued, in the lower court in his state PCRA, that prior counsel were ineffective for failing to object to the lack of a specific alibi charge placing the

burden of proof on the Commonwealth to disprove his alibi beyond a reasonable doubt. The Third Circuit Court of Appeals denied his un-counseled motion for a certificate of appealability.

C. Reasons for Granting the Writ

1. Pennsylvania's courts denied petitioner due process of law and a fair trial under the Fifth and Fourteenth Amendments when the judge in his murder trial failed to inform the jury that the state has the never-shifting burden of convincing the jury beyond a reasonable doubt that petitioner's alibi was not true and this court's long-standing precedent requires an outcome contrary to that reached by both the Pennsylvania's courts, and the lower Federal courts.

At trial, petitioner and his wife testified that he was either at home asleep, or on another street corner at the time of the shooting in the instant case. The trial court gave the following alibi instruction:

"Obviously the defendant, Mr. Harrison, cannot be guilty unless he was at the scene of this shooting at 28th and Columbia. A defendant and Mr. Harrison have offered evidence to show that he was not present at the scene of the shooting of Mr. Gus Favors at 28th and Columbia but rather was at home or at the corner of Hollywood and Jefferson Street at the time of the shooting. You should consider the evidence along with all the other evidence in the case in determining whether the Commonwealth has met its burden of proving beyond a reasonable doubt that a crime was committed and that the defendant committed or took part in committing that crime. The defendant's evidence, that is the evidence of the defendant's witnesses and the defendant and Mrs. Harrison that he was not present either by itself or together with other evidence may be sufficient to raise a reasonable doubt of his guilt in your minds. If you have a reasonable doubt of the defendant's guilt, you must find him not guilty."

That alibi instruction is completely inadequate under Third Circuit precedent which requires the court to instruct the jury that the prosecution has to convince the jury beyond a reasonable doubt that an alibi is not true. *U.S. v. Simon*, 995 F.2d 1236 (3rd Cir. 1993); *U.S. v. Booz*, 451 F.2d 719 (3rd Cir. 1971). The Third Circuit Court of Appeals erroneously refused to grant a certificate

of appealability in the instant case, and thus never reached the substantive issue which petitioner raises before this court. However, had the Third Circuit accepted this case for review, it would have been compelled to grant the writ, because the instruction given clearly violates Third Circuit precedent.

Furthermore, this court has consistently held that a jury instruction is constitutionally infirm, to the extent that it suggests that an accused bears a burden of persuasion on any element of the accusation. See, i.e. *Yates v. Evatt*, 111 S.Ct. 1884, 1892, 114 L.Ed.2d 432 (1991) (improper shifting of burden of proof of malice); *Rose v. Clark*, 478 U.S. 570, 575, 92 L.Ed.2d 460, 106 S.Ct. 3101 n.3 (1986) (cannot shift burden of proof on malice); *Sandstrom v. Montana*, 442 U.S. 510, 523-24, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979) (irrebuttable or shifted presumption of intent violates due process); *Francis v. Franklin,* 471 U.S. 305, 851 L.Ed.2d 344, 105 S.Ct. 1965 (1985) (same); *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975) (shifting burden of persuasion to defendant violates due process).

Pennsylvania's own jurisprudence requires no less. See *Commonwealth v. Collins*, 549 Pa. 593, 702 A.2d 540 (1997) (Commonwealth has never-shifting burden to persuade the jury beyond a reasonable doubt, not withstanding alibi defense).

The evidence in the instant case was certainly not overwhelming. In contrast to *Simon, supra.*, in which four eye-witnesses consistently identified Mr. Simon as the shooter, and the alibi defense was weak and riddled with inconsistencies, only one individual in Mr. Harrison's case identified him as the shooter. That witness, who had been employed briefly as a police officer, only came forward after a year of silence. Petitioner's alibi may well have raised a reasonable doubt in the jurors' minds, and had they been properly instructed that it was the Commonwealth's burden to dispel that doubt, rather than that petitioner had the burden of persuasion, there is a substantial likelihood that he would have been acquitted.

The Court of Appeals erred in refusing to issue a certificate of appealability on Mr. Harrison's vital jury instruction issue. This Court has just reaffirmed that the standard for issuance of a

certificate of appealability is met when a petitioner demonstrates that jurists of reason could disagree with the district court's resolution of his case, or that the issues presented are adequate to justify further proceedings *Miller-el v. Cockrell*, 123 S.Ct. 1029, 154 L.Ed.2d 931, __ U.S. __ (2003).

Because the jury was not properly instructed that the Commonwealth had the never-shifting burden of persuading the jury that petitioner's alibi was not valid, petitioner was denied due process under the Fifth and Fourteenth Amendments under the United States Constitution.

For that reason, this court should grant the petition for certiorari, or in the alternative, reverse the Third Circuit's denial of the certificate of appealability and order that court to review, on the merits, the alibi instruction issue.

2. Petitioner, Charles Harrison, was deprived of his right to effective assistance of counsel guaranteed by the Sixth Amendment where prior counsel failed to raise the issue of the constitutionally infirm alibi instruction, discussed above.

Petitioner's trial counsel failed to object to the constitutionally flawed alibi instruction, discussed above. His direct appeal lawyer ignored the issue. When petitioner filed a *pro se* post conviction habeas corpus petition (PCRA) at the Pennsylvania trial court level, he was unaware of the issue. Counsel was appointed for him, but concluded in a letter that there were no arguable issues and moved to withdraw from the case. Petitioner, desperately re-reviewing the record of his own case, determined that the alibi instruction given at his trial was constitutionally flawed, and raised the issue with the PCRA court, a trial level court.

The PCRA court was given the opportunity to address the constitutionally flawed alibi instruction, but refused to do so.

The trial level court (PCRA) ignored petitioner's uncounseled objections, and dismissed his petition. All subsequent courts, despite petitioner's having raised this issue at the trial court level, on habeas corpus, deemed the issue waived or procedurally defaulted.

At each stage following petitioner's identification and arguing of the constitutionally infirm alibi instruction issue, with or without counsel, petitioner has raised this issue, as well as the constitutionally ineffective assistance of trial counsel, appellate counsel, and briefly-appointed PCRA counsel. This court has consistently held that ineffective assistance of counsel constitutes cause to excuse a procedural default. *Coleman v. Thompson*, 501 U.S. 722, 730, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The prejudice to petitioner is evident:

Had the trial jury been instructed that the Commonwealth of Pennsylvania had the never-shifting burden of disproving petitioner's alibi beyond a reasonable doubt, he would have been found not guilty.

Under the standard recently enunciated by this court in *Miller-el v. Cockrell, supra.*, a certificate of appealability should have been issued.

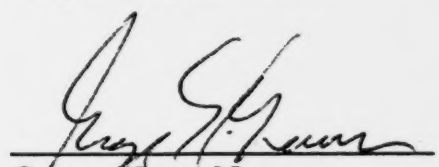
Because petitioner did not have the effective assistance of counsel through trial, appeal, and initially during the PCRA process, because those lawyers' incompetence deprived him of

having a jury fairly consider whether he was proved guilty beyond a reasonable doubt, and because petitioner has consistently raised this issue in the state habeas corpus proceedings and thereafter, this court should grant his petition for certiorari, or in the alternative reverse the Third Circuit's denial of the certificate of appealability and order that court to review, on the merits, the alibi instruction issue.

D. Conclusion

Wherefore for all of the foregoing reasons, petitioner prays that this Honorable Court grant his petition for certiorari to review the order of the United States Court of Appeals for the Third Circuit, or in the alternative, reverse per curium the Third Circuit Courts of Appeals' denial of his application for a certificate of appealability, and order the Third Circuit to consider his alibi instruction issue, on the merits.

Respectfully submitted,



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APPENDIX A - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING MR. HARRISON'S PETITION FOR REHEARING DATED JANUARY 9, 2003

JANUARY 9, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-3281

CHARLES HARRISON,
Appellant

v.

DONALD VAUGHN, WARDEN; D. MICHAEL FISHER, STATE ATTORNEY GENERAL; and THE DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY

On Appeal from the United States District Court for the
(D.C. Civ. No. 00-cv-01606)
SUR PETITION FOR REHEARING

APPENDIX A

BEFORE: BECKER, Chief Judge,

SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES and SMITH, Circuit Judges

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

Received and Filed
lml

January 9, 2003

APPENDIX A

Marcia M. Waldron,

Clerk

Harrison v. Vaughn

No. 01-3281

Page 2

January 9, 2003

By the Court,

s/_____

United States Circuit Judge

Date: January 9, 2003

LmL/cc: Mr. CH

MFM

APPENDIX B - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING MR. HARRISON'S PETITION FOR A CERTIFICATE OF APPEALABILITY NOVEMBER 13, 2002

DPS-247 July 25, 2002

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 01-3281

CHARLES HARRISON,

Appellant

vs.

DONALD VAUGHN, WARDEN, ET AL.

(E.D. PA. Civ. No. 00-cv-01606)

Present: NYGAARD, ROTH and BARRY, CIRCUIT JUDGES

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. §2253(c)(1);

in the above-captioned case.

Respectfully,

APPENDIX B

Clerk

MMW/JLR/je/lml

ORDER

Appellant's request for a certificate of appealability is denied. Appellant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. §2253(c).

By the Court,

s/_____

Circuit Judge

Dated: November 13, 2002

LML/cc: Mr. CH

MFM

Received and Filed

November 13, 2002 lml

Marcia M. Waldron,
Clerk

APPENDIX C - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DENYING MR. HARRISON'S PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. §2254 DATED AUGUST 1, 2001

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES HARRISON	:	CIVIL ACTION
vs.	:	NO. 00-1606
DONALD VAUGHN, et al.	:	

ORDER

AND NOW, this 1st day of August, 2001, upon consideration of the Petition for Writ of Habeas Corpus under 28 U.S.C. §2254 filed by Charles Harrison, the record in this case, the Report and Recommendation of United States Magistrate Judge Charles B. Smith dated June 25, 2001, the Objections of Petitioner, Charles Harrison, to the Report and Recommendation of the Magistrate Judge, and the Response to Petitioner's Objections to the United States Magistrate Judge's Report and Recommendation,

APPENDIX C

IT IS ORDERED as follows:

1. The Report and Recommendation of United States Magistrate Judge Charles b. Smith dated June 25, 2001, is **APPROVED** and **ADOPTED**;
2. The Objections of Petitioner, Charles Harrison, to the Report and Recommendation of the United States Magistrate Judge are **OVERRULED**;
1. The Petition for Writ of Habeas Corpus filed by Charles Harrison under 28 U.S.C. §2254 is **DENIED AND DISMISSED** without an evidentiary hearing; and
2. A certificate of appealability will not be issued on the ground that petitioner, Charles Harrison, has not made a substantial showing of a denial of a constitutional right. (28 U.S.C. §2254(c)(2)).

BY THE COURT:
s/Jan E. Dubois, J.
ENTERED
AUG 1 2001
CLERK OF COURT

APPENDIX D - REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DENYING AND DISMISSING MR. HARRISON'S PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2254 DATED JUNE 25, 2001

CHARLES HARRISON,	:	CIVIL ACTION
Petitioner	:	
VS.	:	NO. 00-1606
DONALD VAUGHN, WARDEN	:	
AND	:	
MICHAEL FISHER,	:	
STATE ATTORNEY GENERAL	:	
AND	:	
THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA,	:	
Respondents	:	

APPENDIX D

ORDER

AND NOW, to wit, this day of , 2001, upon consideration of the pleadings and record herein, and after review of the Report and Recommendation of United States Magistrate Judge Charles B. Smith, it is hereby ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C.§2254, is DENIED and DISMISSED WITHOUT AN EVIDENTIARY HEARING.
3. There is no probable cause to issue a certificate of appealability.

It is so ORDERED.

BY THE COURT:

_____

JAN E. DUBOIS, J.

APPENDIX D

CHARLES HARRISON,	:	CIVIL ACTION
Petitioner	:	
VS.	:	NO. 00-1606
DONALD VAUGHN, WARDEN	:	
AND	:	
MICHAEL FISHER,	:	
STATE ATTORNEY GENERAL	:	
AND	:	
THE DISTRICT ATTORNEY OF	:	
THE COUNTY OF PHILADELPHIA,		
Respondents	:	

FILED JUN 25 2001

ENTERED: JUNE 26, 2001

CLERK OF COURT

I. PROCEDURAL HISTORY[1]

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1. The Procedural history is complied from a review of the Petition for Writ of Habeas Corpus, the Response of the Philadelphia District Attorney, with exhibits attached, and the Brief of Petitioner In Support of Amended Application for Writ of Habeas Corpus.

APPENDIX D

This is a counseled Amended Petition for Writ of Habeas Corpus filed by a state prisoner pursuant to 28 U.S.C. §2254. Petitioner, Charles Harrison, is currently imprisoned at Graterford Correctional Institution.

On June 2, 1988, a Philadelphia jury, sitting before the Honorable Michael R. Stiles in the Court of Common Pleas, convicted Petitioner of first degree murder, criminal conspiracy, and possession of an instrument of crime in connection with the shooting and killing of Augustus Favors. Judge Stiles sentenced Petitioner to life imprisonment for the first degree murder conviction, deferring sentencing on the remaining charges. On June 6, 1988, trial counsel, Joel S. Moldovsky, Esquire, filed post-verdict motions. Mr. Moldovsky was permitted to withdraw and new counsel, Thomas A. Bello, Esquire, filed supplemental post-verdict motions which alleged the ineffective assistance of trial counsel. Judge Stiles, after an evidentiary hearing on February 28, 1989, denied the post-verdict motions and imposed concurrent prison terms of five to ten years for the conspiracy conviction and

two and one-half to five years for the possession of an instrument of crime conviction.

Petitioner appealed to the Pennsylvania Superior Court, claiming that: (1) trial counsel was ineffective for failing to call additional alibi witnesses; (2) trial counsel was ineffective for failing to call an eyewitness; (3) trial counsel was ineffective for failing to object to references to petitioner's prior criminal conduct; (4) the verdicts were contrary to the weight of the evidence; and (5) the verdicts were based upon insufficient evidence. The Superior Court affirmed the judgements of sentence in an unpublished memorandum opinion filed January 16, 1990. Commonwealth v. Harrison, 398 Pa.Super. 644, 573 A.2d 620 (1990). The Pennsylvania Supreme Court denied allocatur on July 18, 1990. Commonwealth v. Harrison, 525 Pa. 642, 581 A.2d 569 (1990).

Petitioner subsequently filed a pro se petition for collateral review under Pennsylvania's Post Conviction Relief Act, 42 Pa.C.S.A. §9541 et. seq., on January 17, 1996 alleging that: (1) counsel were ineffective for failing to seek dismissal of the charges

based on insufficiency of the evidence; (2) trial counsel was ineffective for failing to object to the prosecutor's remarks concerning reasonable doubt; (3) the arrest warrant was issued without probable cause; (4) trial counsel was ineffective for failing to impeach a witness; and (5) Petitioner's statement at the police station was the product of an illegal arrest and the absence of counsel. Norris E. Gelman, Esquire, was appointed to represent petitioner, but subsequently advised Petitioner and the PCRA court, in a letter pursuant to Commonwealth v. Finley, 379 Pa.Super. 390, 550 A.2d 213 (1988), that there were no issues of arguable merit upon which to base an amended petition. The Honorable David N. Savitt dismissed the petition and permitted counsel to withdraw on September 19, 1996, after independently reviewing the record.

Petitioner then appealed to the Pennsylvania Superior Court, claiming that: (1) he was denied his constitutional right to a fair trial because the prosecutor made prejudicial remarks in her closing argument; (2) the trial court erred by failing to give an alibi

instruction to the jury; (3) the prosecutor vouched for the witness, Panthea Andrews, and told the jury about alleged threats against the witness; (4) the trial court denied Petitioner a fair trial when it did not allow him to introduce evidence relating to the victim; and (5) all prior counsel, including the PCRA counsel, were ineffective for failing to raise the above-mentioned issues. The Superior Court affirmed the denial of post-conviction relief in an unpublished memorandum opinion filed on September 22, 1997, finding petitioner's first four claims to be waived and his fifth claim to be without merit. Commonwealth v. Harrison, 704 A.2d 162 (Pa.Super. 1997) (table). The Pennsylvania Supreme Court denied allowance of appeal on May 13, 1998. Commonwealth v. Harrison, No. 551 E.D. Allocatur Docket 1997.

Petitioner filed a petition for writ of habeas corpus on April 9, 1999. Harrison v. Vaughn, No. 2:99cv01780 (E.D.Pa. 1999). The Honorable Jan E. DuBois denied Petitioner's application for leave to proceed in forma pauperis on April 20, 1999, and ordered that the habeas action would be dismissed unless Petitioner

submitted a $5.00 filing fee to this Court within 30 days. Id. On June 29, 1999, over sixty days later, Judge DuBois dismissed the petition without prejudice because the filing fee had not been received Id.

Petitioner filed the instant amended petition for writ of habeas corpus on March 28, 2000, some nine months after the dismissal of his original petition. The Clerk of Court reopened the petition as a new habeas petition No. 00cv1606.[2] Id. The petition asserts the following claims:

1. Petitioner was denied a fair trial and due process of law when the prosecutor made improper remarks to the jury in her closing argument, which remarks were prejudicial to Petitioner;
2. Petitioner was denied a fair trial and due process of law when the trial judge failed to give an alibi instruction in the charge to the jury;

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2 Despite the dismissal, this Court finds the petition to be timely filed for the reasons set forth later in this Report and Recommendation. 15d

APPENDIX D

3. Petitioner was denied a fair trial and due process of law when the prosecutor vouched for the Commonwealth witness;
4. Petitioner was denied a fair trial and due process of law when the prosecutor inflamed and prejudiced the jury against him by telling the jury that the Commonwealth's eyewitness allegedly had been threatened;
5. Petitioner was denied a fair trial and due process of law when the trial court denied him the right to impeach the deceased with evidence that: (a) when the police found the deceased, he had quantities of crack cocaine in his pockets; (b) the autopsy revealed that the deceased had narcotics in his system; and (c) he had just been released from prison;
6. Trial counsel was ineffective for failing to raise and preserve each of the above-mentioned issues

numbered one through five;

7. Appellate counsel was ineffective for failing to allege the ineffectiveness of trial counsel for failing to preserve each of the above-mentioned issues numbered one through five.

II. DISCUSSION

A. TIMELINESS

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), enacted April 24, 1996:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgement become final by the conclusion of direct review or the expiration of time for seeking such review[3] 28 U.S.C. §2244(d)(1) (1990). If direct

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3 The statute also sets forth three other potential starting points or the running of the statute of limitations as follows:

review of a criminal conviction ended prior to the statute's effective date of April 24, 1996, then, under Third Circuit precedent, a prisoner has one year subsequent to the effective date

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(B) the date n which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. §2244(d)(1). Petitioner has not alleged that any of these other starting points should be used. Nor do the facts before us reveal that any of them should apply. As such, the Court utilizes the date on which the judgement became final by conclusion of direct review or the expiration of time for seeking such review, including the time for filing a writ of certiorari in the Supreme Court. See Supreme Court Rule 13; Morris v. Horn, 187 F.3d 333, 337 n. 1 (3d Cir. 1999).

to commence a habeas action, *i.e.* April 23, 1997. Burns v. Morton, 134 F.3d 109, 111-112 (3d Cir. 1998).

Additionally, the statue creates a tolling exception and notes that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgement or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. §2244(d)(2) (emphasis added). A "properly filed application" is "one submitted according to the states procedural requirements, such as the rules governing the time and place of filing." Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). If a petitioner files an out-of-time application and the state court dismisses it as either time-barred or waived, then it is not deemed to be a "properly filed application." Morris v. Horn, 187 F.3d 333, 338 (3d Cir. 1999); Cohen v. District Attorney for Philadelphia County, Civ. A. No. 98-6136, 1999 WL 358966, *# (E.D. Pa. June 4, 1999).

In the case at bar, Petitioner's judgement became final on October 18, 1990, ninety days after the Pennsylvania Supreme

Court denied allocatur. Since the conviction became final before the effective date of the AEDPA of April 24, 1996, Petitioner would normally have had until April 23, 1997 to initiate his habeas action. However, since Petitioner's action for state collateral relief was still pending at that time, the one-year grace period did not begin on April 24, 1996. The action ceased to be pending on May 13, 1998, when the Pennsylvania Supreme Court denied allowance of appeal. Consequently, the AEDOA statute of limitations was tolled only until that date.[4] The one year grace period thus extended the opportunity to file until May 12, 1999.

Even though Judge DuBois dismissed petitioner's original petition on June 29, 1999 for failure to pay the five dollar filing

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4 The AEDPA statute of limitations was not tolled during the ninety day period of May 13, 1998, until August 11, 1998, when Petitioner could have sought a writ of certiorari in the United States Supreme Court. See Stokes v. District Attorney of Philadelphia, 247 F.3d 539, 2001 WL 387516 (3d Cir., Filed 4/17/01) (limitations period does not toll under 28 U.S.C. §2244(d)(2) for the ninety-day period in which petitioner could have filed a petition for certiorari after denial of state collateral relief).

fee, Petitioner has subsequently produced documentation from prison records that such a filing fee was sent to he Clerk's Office on April 27, 1999, shortly before the expiration of the one year grace period. (Brief of Petitioner In Support of Amended Application, Exhibit 4). Even though the District Attorney argues that the petition is not timely because the Court's dockets do not reflect the five dollar payment from the Petitioner, we accept petitioner's prison documentation as a correct account as to when the fee was actually filed. As a result, the Court finds the petition to be timely filed on April 27, 1999.[5]

B. PROCEDURAL DEFAULT

Despite having been timely filed, Petitioner's seven habeas

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5 An inmate is entitled to the "mailbox rule," which states that a petition is deemed filed when it is delivered to the prison mail room. Houston v. Lack, 487 U.S. 266 (1988); Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). Petitioner had only to comply with Judge DuBois' order to pay the filing fee in order to properly file the petition. Since the withdrawal from his prison account is dated April 27, 1999, the Court deems the petition filed as of that date. (See Brief of Petitioner In Support of Amended Application, Exhibit 4).

claims suffer from procedural default, pursuant to an adequate and independent state rule. For the reasons stated below, Petitioner's claims are procedurally defaulted. The Court will later discuss Petitioner's allegations of cause and prejudice sufficient to overcome that procedural default in turn.

The procedural default barrier, in the context of habeas corpus, precludes federal courts from reviewing a state petitioner's federal claims if the state court decision is based on a violation of state procedural law that is independent of the federal question and adequate to support the judgement. Coleman v. Thompson, 501 U.S. 722, 729, reh'g denied, 501 U.S. 1277 (1991). "In the context of direct review of a state court judgement, the independent and adequate state ground doctrine is jurisdictional . . . [b]ecause this Court has no power to review a state law determination that is sufficient to support the judgement." Id. The rule applies regardless of whether the state law relied upon is substantive or procedural, id., and rests in part on respect for the integrity of procedures "employed by a coordinate jurisdiction within the

federal system. Wainwright v. Sykes, 433 U.S. 72, 88, reh'g denied, 434 U.S. 880 (1977). Although the issue of procedural default under state law is best addressed by the state courts in the first instance, a federal court may dismiss a petition as procedurally barred if state law would unambiguously deem it faulted. Carter v. Vaughn, 62 F.3d 591, 595 (3d Cir. 1995).

1. Waiver

In the instant case, the Pennsylvania Superior Court found Petitioner's first four claims, in addition to his claims of trial and appellate counsel ineffectiveness, to be waived.[6] The Court so found due to the fact that Petitioner failed to raise any of the claims at trial, on direct appeal, or in his PCRA Petition. See Commonwealth v. Harrison, Memorandum Opinion, at 3 & n. 6. Even though Petitioner raised the issues in his request for

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6 The claims which were deemed waived include Petitioner's claims of ineffectiveness of trial and appellate counsel, along with the first five habeas claims before this court. Petitioner has not alleged ineffectiveness of PCRA counsel in his habeas petition. Essentially, all of the claims before this Court have been deemed waived by the Superior Court.

discretionary review to the Pennsylvania Supreme Court, he cannot use that act to overcome the procedural default which the Superior Court found. See Sistrunk v. Vaughn, 96 F.3d 666, 674 n.9 (3d Cir. 1996), citing Ylst v. Nunnemaker, 501 U.S. 797 (1991) (where a state intermediate appellate court found a claim procedurally defaulted and the state supreme court denied discretionary review, federal review would be barred by state-law procedural default).[7]

Petitioner argues that the Superior Court should not have found the claims to be waived for two reasons. First, he claims

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7 Petitioner has no further available remedy in the state system. The Amended Post-Conviction Relief Act, effective on January 16, 1996, provides that collateral actions must be filed within one year of the date the conviction at issue became final. 42 Pa.C.S.A §9545(b)(1). The state of limitations has long since run for any additional collateral attack on Petitioner's conviction. Even though there is a one year grace period for petitioners whose judgement became final before the effective date, the time limit has still run for Petitioner. Commonwealth v. Barrett, 761 A.2d 145 (Sup. 2000). Even if Petitioner's claim that his petition should be deemed filed before the effective date of the amendments is valid, it does not effect the statute of limitations, as the amendments regarding timing have been held to apply retroactively. Commonwealth v. Fahy, 737 A.2d 214 (Sup. 1999). 24d

that his objections to the Finley letter properly preserved the issues for consideration on appeal from PCRA to the Superior Court. Second, he argues that the Superior Court incorrectly found Petitioner's PCRA petition to be filed on January 17, 1996, one day after the effective date of the amendments to the PCRA itself. The Superior Court found that as such, Petitioner could not avail himself of the anti-waiver provisions of the PCRA, which were removed by the amendments.

Before addressing these issues, the Court notes that Petitioner asserts these two claims as errors of the Superior Court in the interpretation of state law. As a general matter, a federal habeas corpus petition cannot assert errors of state law. Pulley v. Harris, 465 U.S. 37, 41 (1984). These claims are not constitutional in nature, so this Court must defer to the Superior Court's determination of state law.

Notwithstanding this deference, the Court notes that the Superior Court's determination that the objections to the Finley letter did not properly preserve the issues for appeal is sound.

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Petitioner was represented by different counsel at trial and on direct appeal. Any claims of ineffectiveness of counsel had to be raised at the first opportunity at which counsel whose ineffectiveness was being challenged no longer represented Petitioner. See Commonwealth v. Miller, 388 Pa.Super. 7 (1989). The proper time to assert ineffectiveness would have been on direct appeal for trial counsel, and in the PCRA petition for appellate counsel. Petitioner failed to raise the ineffectiveness claims asserted in his habeas petition at either time.

Additionally, Petitioner waived his first five claims when he did not raise them in his PCRA petition. Commonwealth v. Frank, 433 Pa. Super. 246, 252 (1994) (Waiver results from petitioner's failure to raise issues before the PCRA court). See also, Commonwealth v. White, 449 Pa. Super.386, 394 n. 6 (1996) (pro se claimants are not relieved of the duty to properly raise and develop appealable claims).

This Court recognizes that Petitioner has a possible colorable claim that his PCRA petition should be deemed filed

prior to the effective date of the PCRA amendments. However, since that issue is one of a state court's determination of state law, Petitioner must avail himself of the state system in order to pursue that claim. Consequently, this Court accepts the Superior Court's conclusion that Petitioner could not make use of the anti-waiver provisions of the PCRA.

Since Petitioner did not properly preserve the issues for review by the Superior Court, the Court subsequently found them to be waived, and also found that Petitioner could not circumvent that waiver through the PCRA anti-waiver provisions, this Court finds those issues to be waived. Therefore, since Petitioner has no further available state collateral relief, his claims are procedurally defaulted. (See n. 4).

2. Exceptions to Procedural Default

In order to survive procedural default in the federal courts, a petitioner must "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a

fundamental miscarriage of justice." Coleman, 501 U.S. at 749-750. The cause and prejudice analysis embraces two separate elements. A demonstration of cause sufficient to survive dismissal "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." Caswell v. Ryan, 953 F.2d 853, 862 (3d Cir.), cert. denied, 504 U.S. 944 (1992) (citing Murray v. Carrier, 477 U.S. 478, 488 (1986). Once cause is show, the petitioner bears the additional burden of proving some resulting prejudice. Prejudice means that the errors at trial "worked to [petitioner's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Murray, 477 U.S. at 494 (1986) (quoting United States v. Frady, 456 U.S. 152, 170-172, reh'g denied, 465 U.S. 1001 (1982).[8]

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8 The fundamental miscarriage of justice exception requires that petitioner to come forward with a colorable claim of actual innocence. Sawyer v. Whitley, 505 U.S. 333, 339, reh'g denied, 505 U.S. 1244 (1992) (quoting Kuhlman v. Wilson, 477 U.S. 436, 454 (1986). Alleging actual innocence has been construed to mean

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Petitioner argues that his ineffectiveness of counsel claims can serve as cause to excuse the other procedurally defaulted habeas claims. However, in order for an ineffectiveness claim to serve as cause to excuse another habeas claim, the ineffectiveness claim must not be procedurally defaulted itself. Edwards v. Carpenter, 529 U.S. 446, 452-453. If the ineffectiveness claim is procedurally defaulted, a petitioner must show cause and prejudice sufficient to overcome that procedural default in order for the claim to properly serve as cause for another procedurally defaulted habeas claim. Id., at 452-453.

Petitioner first raised the ineffectiveness of trial and appellate counsel claims on appeal. As stated above, the Superior Court deemed them waived, which is the basis for this Court's finding of procedural default. Since they are defaulted, Petitioner

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that a petitioner must demonstrate that the alleged violation either precluded the development of true facts or resulted in the admission of false ones. Banks v. Horn, 49 F. Supp.2d 400, 409 (M.D. Pa. 1999) (citing Sawyer, 505 U.S. at 339-340 (1992). This exception does not apply in this case, as Petitioner has not come forward with any allegations of actual innocence. 29d

must come forward with allegations of cause and prejudice in relation to his ineffective assistance of counsel claims in order for them to serve as cause to excuse the other defaulted habeas claims. Petitioner has not done so. As he has failed to allege cause and prejudice, this Court is precluded from reviewing the ineffectiveness claims on the merits. Teague v. Lane, 489 U.S. 288, 298-299 (1989) (A state prisoner's failure to allege cause and prejudice to excuse state procedural default precludes federal habeas review of he defaulted claim). Consequently, the ineffectiveness of counsel claims are procedurally defaulted, providing no basis to excuse the other procedurally defaulted claims. The petition must be denied.

There, I make the following:

RECOMMENDATION

AND NOW, this 25th day of June, 2001, IT IS RESPECTFULLY RECOMMENDED that the Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, be DENIED and DISMISSED WITHOUT AN EVIDENTIARY HEARING. There

is no probable cause to issue a certificate of appealability.

s/_____

CHARLES B. SMITH

UNITED STATES MAGISTRATE JUDGE